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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 135.

JOSIAH FOGG, APPELLANT,

vs.

JOHN I. BLAIR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 3, 1887.

Payment in confederate bonds and tea:

Schroder's Case, L. R. 11 Eq., 130.

Payment in damages for surrender of contract by a director:

Adamson's Case, L. R. 670.
Ferrao's Case, L. R. 9 Ch. 355.

Compromise and cancellation of shares:

Dixon vs. Evans, L. R. 5 H. L. 606.
Hyde vs. Lyndé, 4 N. Y. 390.

VI.

The decision of the Supreme Court of Iowa in Jackson vs. Traer 54 Iowa, 469, holding other share-holders liable on shares of this stock is upon a question of general jurisprudence. It is in conflict with the decisions of this court, with the general current of authorities, and should not be followed.

That court first decided there was no liability on the stock. Its decision on re-hearing was by a bare majority of the court, two of its members dissenting.

The reasoning in the original and dissenting opinions is quite conclusive against the theories of plaintiff in error.

The above decision was made in 1884, long after this suit was pending in the court, below, and is therefore not binding on the Federal Courts.

Burgess vs. Seligman, 107 U. S., 20.
Pana vs. Bolwer, 107 U. S., 541.
Ins. Co. vs. Broughton, 109 U. S., 126.
Carroll Co. vs. Smith, 111 U. S., 543.
R. R. Co. vs. Visscher, 114 U. S., 353.
Bolles vs. Brimfield, 120 U. S., 537.

Defendant in error believes that the court below should have followed the decision of the Supreme Court of Iowa, holding upon the same facts, and the same shares of stock now in controversy, all right of action was barred by the statute of limitations.

Bank vs. Greene Admnr., 54 Iowa, 445.

If this court should sustain this view, it may be that the ruling of the court below was in any possible view error without prejudice, and that the judgment of the court below, if it had jurisdiction, and this court has jurisdiction, should be affirmed on the ground that the alleged right of action is barred by the statute. This question was raised by defendant in the court below, and the facts are all before this court. It may be that defendant cannot avail himself of it upon the present writ of error. There seems to be clear ground however, for affirming the judgment of the court below, without going into this matter, if jurisdiction is shown,

CHAS. A. CLARK,
For Defendant in Error.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 26, 1890.

1 UNITED STATES OF AMERICA, }
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for the Eastern Division of said District.

Be it remembered that on the nineteenth day of January, A. D. 1886, the following, among other, proceedings were had and appear of record in the circuit court of the United States in and for the eastern district of Missouri, to wit:

JOSIAH FOGG, Plaintiff, }
vs. } 2593.
JOHN I. BLAIR, Defendant. }

Now comes defendant, by Larned and Case, his attorneys, and files transcript from the St. Louis circuit court and enters appearance herein.

Said transcript is in words and figures following, to wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Be it remembered that heretofore, to wit, on the 8th day of December, 1885, there was filed in the office of the clerk of the circuit court of the city of St. Louis a petition, wherein Josiah Fogg is plaintiff and John I. Blair is defendant; which petition is in the words and figures as follows, to wit:

Petition.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

In the Circuit Court. February Term, 1886.

JOSIAH FOGG, Plaintiff, }
vs. }
2 JOHN I. BLAIR, Defendant. }

Plaintiff states that on or about the 5th day of May, 1884, by the judgment and decree of the circuit court of the United States in and for the eastern district of the State of Missouri, in a certain cause then pending at said court, wherein this plaintiff was the plaintiff and complainant and The St. Louis, Hannibal and Keokuk Railroad Company and The St. Louis and Keokuk Railroad Company were the defendants, he recovered a judgment and decree in his favor and against the said defendants in said cause for the sum of 18,365.11 dollars and costs and charges in that behalf expended; that at the date of the recovery of said decree the said St. Louis and Keokuk R. R. Co. was and for a long time prior thereto had been utterly insolvent, and that at said date the said St. Louis, Hannibal and Keokuk Railroad Company was also insolvent and was in the

hands and custody of the said circuit court of the United States for the eastern district of Missouri by virtue of certain decrees and proceedings had at said court in a certain suit to foreclose a mortgage or deed of trust, in which suit one Delbitt Clinton Blair was complainant and said railroad company and others were defendants, and that all its property of every kind was in the custody of said court by its receiver and beyond the reach of ordinary process, and so that on the day aforesaid no execution could be issued against it; that on the 8th day of December, 1885, in pursuance of a decree entered in October, 1885, in the cause last aforesaid by the court last aforesaid, the property, real and personal, of the St. Louis, Hannibal and Keokuk Railroad Company was sold to this de-
3 fendant, and under orders in said court the proceeds of said sale applied or to be applied to the payment of the mortgage sued on, and nothing whatever of the property of said company which could be reached by execution has remained to said company, nor has said mortgage debt nor any of the other claims prior in right to the claim of the plaintiff been paid, nor has any thing been paid on account of this plaintiff's said claim, nor has said company any property of any kind out of which said judgment and decree of this plaintiff could be made, save and except its unpaid subscriptions to its capital stock.

That by the sale aforesaid the said company has been deprived of all its property and is virtually dissolved.

That the said defendant is now and at the date of the rendition of the judgment and decree aforesaid was the owner and holder of 4,240 shares of the capital stock of the said St. Louis, Hannibal and Keokuk Railroad Company of the par value of 100 dollars each, on which he has never paid anything, and for which he was and is indebted to said company in the sum of 424,000 dollars.

That it would be useless and unavailable to issue an execution on said judgment and decree; that there is no other stockholder of said company in the jurisdiction of this court.

Wherefore plaintiff prays for a decree against said defendant that he pay to said plaintiff the amount of said judgment and decree, and interest thereon from its date, as well as costs in that
4 suit, and for such other and further relief as the nature and circumstances of the case demand and to this court shall seem equitable.

JAMES CARR,
GEO. D. REYNOLDS,
Att'ys for Plaintiff.

Upon the filing of which petition a summons was issued same day, directed to the sheriff of the city of St. Louis; which summons, together with the sheriff's return thereon, is in words and figures as follows, to wit:

Summons.

THE STATE OF MISSOURI, } ss :
City of St. Louis, }

To the sheriff of the city of St. Louis, Greeting:

We command you to summon John I. Blair to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of St. Louis on the first Monday of February next, then and there to answer to the complaint of Josiah Fogg, as set forth in the annexed petition; and have you then and there this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this 8th day of December, in the year of our Lord eighteen hundred and eighty-five.

[SEAL.] CHARLES F. VOGEL, *Clerk.*

5 *Return.*

Executed the within writ by delivering a copy of the same and also a true copy of the petition annexed to the within-named John I. Blair, the defendant. This done at the city of St. Louis, Missouri, this 8th day of December, 1885.

Fee, $1.00.

HENRY F. HARRINGTON, *Sheriff,*
By A. P. SHEEHAN, *Deputy.*

And afterwards, at a special term of the circuit court, being the December term, 1885, thereof, the following proceeding was had in said cause, to wit:

Petition and Bond for Removal Filed and Cause Removed to United States Circuit Court.

JOSIAH FOGG }
vs.
JOHN I. BLAIR. }

THURSDAY, *January 14th,* 1886.

On the pleadings and proceedings herein and on the petition and bond filed herein by the defendant, John I. Blair, under the provisions of an act of the Congress of the United States, passed March 3rd, 1885, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and on motion of Theo. G. Case, Esq., of counsel for defendant, it is ordered that the security offered by the said defendant, John I. Blair, be approved, and that the State court proceed no further in this cause, and that this cause be removed into the circuit court of the United States for the eastern district of Missouri, and that the clerk of this court

forthwith certify to the circuit court of the United States for
6 the eastern district of Missouri a full, true, and complete transcript of the record and proceedings in this cause as fully as the same remains in his office.

Which petition and bond for removal are respectively in the words and figures as follows, to wit:

Petition for Removal.

In the Circuit Court of the City of St. Louis, State of Missouri.

JOSIAH FOGG, Plaintiff,
vs.
JOHN I. BLAIR, Defendant. } Petition.

Petition for removal to the circuit court of the United States for the eastern district of Missouri.

To the honorable the circuit court of the city of St. Louis, State of Missouri:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of New Jersey, and that the said plaintiff was and still is a citizen of the State of Missouri.

And your petitioner offers herewith a good and sufficient
7 surety for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the eastern district of Missouri; and he will ever pray.

JOHN I. BLAIR,
By THEO. G. CASE,
Attorney for Petitioner.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

I, Theo. G. Case, being duly sworn, do say that I am the attorney for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

THEO. G. CASE.

Subscribed by the said Theo. G. Case in my presence, *by* and by him sworn to before me this 14th day of January, A. D. 1886. My term expires May 10th, 1889.

[SEAL.] V. B. BACIGALUPO,
Notary Public.

8 *Bond for Removal.*

Know all men by these presents that I, John I. Blair, by Theo. G. Case, my attorney, as principal, and Robert S. McDonald, as surety, are held and firmly bound unto Josiah Fogg in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made, unto the said Josiah Fogg, heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said John I. Blair having petitioned the circuit court of the city of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein Josiah Fogg is plaintiff and John I. Blair is defendant, to the circuit court of the United States in and for the eastern district of Missouri:

Now, if the said John I. Blair, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 14th day of January, A. D. 1886.

JOHN I. BLAIR, [SEAL.]
By THEO. G. CASE, *His Att'y.*
R. S. McDONALD. [SEAL.]

Approved by the court Jan'y 14th, 1886.
Attest: CHARLES F. VOGEL, *Clerk.*

9 STATE OF MISSOURI, } *ss:*
City of St. Louis, }

I, Robert MacDonald, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Missouri and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Missouri liable to execution of the value of more than five hundred dollars.

R. S. MACDONALD.

Subscribed in my presence by Robert S. MacDonald and by him sworn to before me this 14th day of January, A. D. 1886.

My term expires May 10th, 1889.

[SEAL.] V. P. BACIGALUPO,
Notary Public.

Certificate.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Charles F. Vogel, clerk of the circuit court of the city of St. Louis, do here certify that the above and foregoing is a true, full, and complete transcript of the record and proceedings in a certain cause wherein Josiah Fogg is plaintiff and John I. Blair is defendant, as fully as the same remain on file and of record in my office.

10 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of St. Louis, this 18th day of January, A. D. 1886.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

And afterwards, to wit, on the first day of November, 1886, the following further proceedings were had and appear of record in said cause, to wit:

JOSIAH FOGG, Complainant,
vs.
JOHN I. BLAIR, Defendant. } 2593.

Under order of court heretofore made, transferring this case from the law docket and giving complainant leave to reform his pleadings, the said complainant now files his bill of complaint.

Said bill of complaint is in words and figures following, to wit:

11 *Amended Bill Filed by Leave.*

In the Circuit Court of the United States for the Eastern District of Missouri.

JOSIAH FOGG, Complainant,
vs.
JOHN I. BLAIR, Defendant. } In Equity.

To the judges of the circuit court of the United States for the eastern district of Missouri:

Your orator, Josiah Fogg, of the city of St. Louis, and a citizen of the State of Missouri, brings this his bill of complaint on behalf of himself and all other judgment creditors of the St. Louis, Hannibal and Keokuk Railroad Company who shall come in and seek relief by and contribute to the expense of this suit against John I. Blair, of Blairstown, and a citizen of the State of New Jersey; and thereupon your orator complains and says that the St. Louis and Keokuk Railroad Company was duly incorporated and organized under and pursuant to an act of the General Assembly of the State of Missouri entitled "An act to incorporate the St. Louis and Keokuk Railroad Company," approved February the 16th, 1857; that under said charter the St. Louis and Keokuk Railroad Company was author-

ized to mark out, locate, and construct a railroad from some suitable point on the North Missouri railroad, not exceeding thirty miles west of St. Charles, in St. Charles county, Missouri, by way of Louisiana, in Pike county, Hannibal, in Marion county, La Grange and Canton, in Lewis county, Missouri, to some point near the mouth of
12 the Des Moines river on the northern boundary of the State of Missouri; that between the 1st day of January, 1867, and the 1st day of May, 1870, said St. Louis and Keokuk Railroad Company located and marked out the St. Louis and Keokuk railroad between what is now called Gilmore, on the Wabash, St. Louis and Pacific railroad, but at the time of making said location it was on the North Missouri railroad about 19 miles west of St. Charles, in St. Charles county, and Alexandria, in Missouri, at the mouth of the Des Moines river on the northern boundary of said State; that the location of the route of said railroad commenced at Gilmore, in St. Charles county, Missouri, and ran in a northerly direction through St. Charles county to Lincoln county and clear through Lincoln county via Troy to a point on the line of Lincoln and Pike counties near Prairieville, in Pike county, Missouri, a distance of 38 miles; that said railroad was located from the fair grounds near Hannibal via New London to Frankfort, in Pike county.

That said St. Louis and Keokuk Railroad Company completed said railroad from said fair grounds to Frankfort, in Pike county, a distance of 18 miles, and did a large amount of grading in Lincoln county as it had marked out and located the same therein.

Your orator says, upon information and belief, that 30 miles, or thereabouts, of grading was done on said part of said railroad in Lincoln county, Missouri, and the sum of $300,000 expended in doing said grading before the making of the contract between John I. Blair and Moses Taylor, as hereinbefore stated, and the St. Louis, Hannibal and Keokuk R. R.; that in grading and com-
13 pleting said railroad between the fair grounds near Hannibal and Frankfort, in Pike county, and in the grading of said railroad in Lincoln county as aforesaid said St. Louis and Keokuk Railroad Company became indebted to a considerable number of persons and for a large sum of money; among the persons to whom it became indebted was your orator, to whom it became indebted as hereinafter stated.

That on the 22nd day of September, 1870, your orator and the said St. Louis and Keokuk Railroad Company had a full and final settlement of all claims and demands which he had against said company and which said company had against him, and upon said settlement said company was found to owe and be indebted to him, among other claims, the sum of $9,547.75, for labor done and money furnished by your orator in the location and construction of said railroad for said St. Louis and Keokuk Railroad Company.

Afterwards, to wit, on the 3rd day of June, 1872, nearly all of the stockholders, directors, and all of the executive officers of said St. Louis and Keokuk Railroad Company entered into articles of association and organized under the General Statutes of the State of Missouri a new railroad corporation, called the St. Louis, Hannibal and Keokuk

Railroad Company, for the purpose of building a railroad between the points named in the charter of said St. Louis and Keokuk Railroad Company and over the same ground most of the way upon which said St. Louis and Keokuk Railroad Company had located, marked out, built, and graded a portion of its railroad as aforesaid; that the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company was fixed by said articles of association at the
14 sum of $6,000,000, divided into 60,000 shares of $100 each.

That on the 3rd day of March, 1873, said St. Louis and Keokuk Railroad Company, by its deed duly signed and acknowledged by its president and secretary and delivered to said St. Louis, Hannibal and Keokuk Railroad Company, assigned, transferred, and set over to said St. Louis, Hannibal and Keokuk Railroad Company its entire line of railroad, completed as well as unfinished, together with all its other property, of every kind and nature, without paying said indebtedness to your orator or said other debts, and by said assignment and transfer of all its property said St. Louis and Keokuk Railroad Company rendered itself incapable of paying said debt to your orator and also its other debts; but in said deed of assignment and transfer it expressly stipulated and required said St. Louis, Hannibal and Keokuk Railroad Company to assume the payment of your orator's said debts, as well as all its other debts, and said St. Louis, Hannibal and Keokuk Railroad Company did expressly assume and agree with said St. Louis and Keokuk Railroad Company to pay said debt to your orator, as well as said other debts. Said deed is on file as an exhibit in the case of your orator against De Witt C. Blair and others in this honorable court, and it is hereby made an exhibit to this bill.

That said St. Louis, Keokuk and Hannibal Railroad Company entered and took possession of said railroad and all other property assigned and transferred to it by said deed, and there was no consideration for said assignment and transfer of said railroad and other property except the assumption and payment of your orator's said debt and said other debts by said St. Louis, Hannibal and Keokuk Railroad Company.

15 That said St. Louis, Hannibal and Keokuk Railroad Company never paid said debt to your orator.

Afterwards, to wit, on the 21st day of September, 1880, your orator commenced an action at law in this court against both said St. Louis and Keokuk Railroad Company and the St. Louis, Hannibal and Keokuk R. R. Co. on said debt due and owing to him by said St. Louis and Keokuk Railroad Company as aforesaid to recover judgment thereon, but upon the trial, which resulted in a mistrial, of said action, at the September term, 1881, of this court, it held and decided that your orator could not recover on said debt against said St. Louis, Hannibal and Keokuk Railroad Company; thereupon said action as to said St. Louis, Hannibal and Keokuk Railroad Company was dismissed. There was a second trial of said action against said St. Louis and Keokuk Railroad Company on the 3rd day of October, 1882, which resulted in your orator's recovering judgment on said debt against said St. Louis and Keokuk Railroad

Company for the sum of $16,496.06 and costs, and on the 17th day of January, 1883, an execution was issued on said judgment in favor of your orator and against said St. Louis and Keokuk Railroad Company to the marshal of this district, returnable to the March term, 1883, of this court, and said execution was returned by said marshal at said term that no property of said St. Louis and Keokuk Railroad Company could be found whereon to levy said execution, and it was returned unsatisfied.

Afterwards, to wit, on the 3rd day of May, 1883, your orator filed his bill in equity against both said St. Louis and Keokuk Railroad Company and the St. Louis, Hannibal and Keokuk Railroad
16 Company in this honorable court to recover the amount of said judgment, interest, and costs from said St. Louis, Hannibal and Keokuk Railroad Company and to have the same declared a first lien on said property assigned and transferred to said St. Louis, Hannibal and Keokuk Railroad Company by said St. Louis and Keokuk Railroad Company as aforesaid, and in said bill the facts hereinbefore stated were alleged as the ground upon which your orator sought to recover, and said St. Louis, Hannibal and Keokuk Railroad Company filed an answer to said bill, and upon issue joined and testimony taken upon the part of your orator, as well as upon the part of said St. Louis, Hannibal and Keokuk Railroad Company, said St. Louis and Keokuk Railroad Company not contesting said judgment and a full hearing of said bill and said St. Louis, Hannibal and Keokuk Railroad Company's answer thereto and your orator's replication to said answer and proofs before this honorable court, and after mature and full consideration of said cause, it, on the 5th day of May, 1884, passed a final decree in favor of your orator and against said St. Louis, Hannibal and Keokuk Railroad Company, as well as against said St. Louis and Keokuk Railroad Company, for the full amount of said judgment, interest, and costs, to wit, the sum of $18,365.11 and costs, and said decree still stands in full force, not appealed from, not reversed, and not satisfied.

Your orator further states on information and belief that on the 24th day of February, 1881, John I. Blair, of Blairstown, New Jersey, and Moses Taylor, of New York city, New York, made and entered into a contract under seal with the St. Louis, Hannibal and Keokuk Railroad Company by which said Blair and Taylor covenanted and agreed with said St. Louis, Hannibal and Keokuk Railroad Company to grade or cause to be graded the St. Louis, Hannibal
17 and Keokuk railroad, to grade or cause to be graded the St. Louis, Hannibal and Keokuk railroad or so much thereof as remained ungraded between the south line of Pike county near Prairieville, in said county, in the State of Missouri, and some point on the Wabash, St. Louis and Pacific railroad between the towns of Wentzville and Peruque thereon, and to build the bridges thereon and to furnish therefor all the materials, including the ties and rails, for the track of said railroad and side track and to complete and finish said portion of said railroad on or before the 31st day of December, 1881, so that it, when finished and completed, should be

equal in construction and materials with the portion of said railroad then completed; in consideration for which said St. Louis, Hannibal and Keokuk Railroad Company covenanted and agreed to pay and deliver to said Blair and Taylor the first-mortgage bonds of said railroad company as would be equal to the sum of $12,000 per mile for each and every mile of said railroad so constructed by them and $850,000 par value of the capital stock of said railroad company in full payment for the construction of said part of said railroad.

That in pursuance of said contract said Blair and Taylor immediately thereafter commenced grading the ungraded portion of said railroad and surfacing up and preparing the graded part thereof ready for laying the cross-ties and rails thereon and went on and finished and completed said part on or about the 15th day of July, 1882, making connection of said part of said railroad with the Wabash, St. Louis and Pacific railroad at a point thereon
18 called Gilmore, a distance of 38 miles of main track and 2 miles of side track; and said railroad company paid and delivered to said Blair and Taylor therefor the first-mortgage bonds of said railroad company to the amount of $480,000, said amount being equal to the sum of $12,000 per mile for said main and side tracks, and on the 7th day of March, 1881, it issued and delivered to said John I. Blair certificate No. 52½ for 4,250 shares of full-paid stock in the capital stock of said railroad company, the par value of which was $100 per share, and also, on the same day, to Moses Taylor certificate No. 52¾ for 4,250 shares of full-paid stock in the capital stock of said railroad company, the par value of which was $100 per share.

Your orator says that the work done by said Blair and Taylor on said part of said railroad as aforesaid was not worth more than $12,000 per mile, and that the payment and delivery of said $12,000 per mile in first-mortgage bonds of said St. Louis, Hannibal and Keokuk Railroad Company to said Blair and Taylor was a full and adequate consideration for all the work done on said part of said railroad by said Blair and Taylor under said contract, and the issuing and delivery of said certificates for said 4,250 full-paid shares each in the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company to said Blair and Taylor as aforesaid was without any valuable consideration paid or moving from said Blair and Taylor or either of them to said railroad company and there was no consideration for said stock and the agreement on the part of said St. Louis, Hannibal and Keokuk
19 Railroad Company, and there was no consideration for said stock; and the agreement on the part of said St. Louis, Hannibal and Keokuk Railroad Company to issue and deliver to said Blair and Taylor shares in its capital stock to the amount of $850,000, pretendingly in part payment for the completion of said part of said railroad between the south line of Pike county, Missouri, near Prairieville, in said county, and Gilmore, on the Wabash, St. Louis and Pacific railroad as aforesaid, was only colorable and was a scheme on the part of said Blair and Taylor to get said stock without paying therefor, and it was a fraud upon your orator and other creditors of said St. Louis, Hannibal and Keokuk Railroad Com-

pany; and your orator says that the making of said contract and issue and delivery by the directors and officers of the St. Louis, Hannibal and Keokuk Railroad Company of said certificates for said 4,250 shares each of full-paid stock in the capital stock of said company to said Blair and Taylor without receiving the par value thereof either in money or work was a breach of trust, of which said Blair and Taylor had full knowledge and notice; and your orator says that the said stock in the hands of said Blair and Taylor was and is null and void as against your orator and other creditors of said St. Louis, Hannibal and Keokuk Railroad Company.

Your orator avers that by reason of the premises said John I. Blair still owes and is indebted to said St. Louis, Hannibal and Keokuk Railroad Company the sum of $425,000 for said 4,250 shares in the capital stock of said railroad company issued and de-
20 livered to him as aforesaid; and the estate of said Moses Taylor likewise still owes and is indebted to said St. Louis, Hannibal and Keokuk Railroad Company the sum of $425,000 for said 4,250 shares in said capital stock of said railroad company issued and delivered to said Moses Taylor as aforesaid.

Your orator further says that on the 6th day of February, 1884, De Witt C. Blair, as trustee for the bondholders named in a certain deed of trust executed by said St. Louis, Hannibal and Keokuk Railroad Company to him on the 1st day of August, 1877, commenced a suit in this honorable court against said St. Louis, Hannibal and Keokuk Railroad Company and others, your orator being one of the defendants to said suit, to foreclose said deed of trust. All of said defendants were duly served with a subpœna to appear and answer said bill, and such proceedings were afterwards had in said suit that a final decree was, on the 20th day of October, 1885, passed by which the equity of redemption of said railroad company in and to its railroad and all other property was foreclosed forever and barred, and said railroad and other property were all, on the 8th day of December, 1885, sold by B. Gratz Brown, Esq., as special master, to said John I. Blair for the sum of $370,000; that said sum was not sufficient to pay the bonds secured by said deed of trust; that your orator's said decree against said St. Louis, Hannibal and Keokuk Railroad Company for said sum of $18,365.11 and costs was held to be junior and inferior to the lien of said deed of trust, and said railroad company had no property of any kind or description out of which your orator could make his said decree unless the same may be made out of the shares of stock held by John I. Blair and Moses
21 Taylor, executors, as hereinafter stated.

Your orator avers that both said St. Louis and Keokuk Railroad Company and said St. Louis, Hannibal and Keokuk Railroad Company are insolvent.

That said St. Louis, Hannibal and Keokuk Railroad Company has no officers and keeps no office, and that foreclosure and sale of all its property as aforesaid practically dissolved it as a corporation.

That the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company was and is a trust fund for the payment of its debts.

Your orator states, upon information and belief, that said Moses Taylor, first having made his last will and testament, departed this life in the year 1882; that said will was duly admitted to probate in the surrogate's court within and for the city and county of New York, in the State of New York; that Percy R. Pyne and —— —— were appointed by said will the executors thereof; that said executors reside at —, in the State of New York, out of the jurisdiction of this honorable court, and that there are no other stockholders of said company whose stock is unpaid and who are known to your orator as such stockholders, save and except said John I. Blair, within the jurisdiction of this court or who can be found here, nor were there any such when this suit was commenced; that the said defendant, John I. Blair, sometimes alleges and pretends that he has paid for said 4,250 shares of stock in the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company, for which he received said certificate as aforesaid, whereas your orator charges the
22 contrary thereof to be the truth, and that said defendant has never paid for said stock or any part thereof, and he still owes and is indebted therefor as hereinbefore stated.

All of which actings, doings, and pretences of the said defendant are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator and all other unsatisfied judgment creditors of said St. Louis, Hannibal and Keokuk Railroad Company in the premises. In consideration whereof and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable—

To the end, therefore, that the said John I. Blair, defendant to this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived, and that said certificate for said 4,250 shares of full-paid stock in the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company issued and delivered to said John I. Blair as aforesaid be cancelled as having been given by said railroad company and received by said John I. Blair without any consideration, and that said John I. Blair be decreed to pay unto your orator the full amount of his said decree against said St. Louis, Hannibal and Keokuk Railroad Company, interest and costs, and also the full amount of the judgments, interests, and costs of such other unsatisfied judgment creditors of said railroad company as shall come in and contribute to the expenses of this suit in proportion to their respective demands, and that your orator and said other unsatisfied judgment creditors of said St. Louis, Hannibal and Keokuk Railroad Company
23 may have such further relief in the premises as to this honorable court may seem meet and the circumstances of this case may require, may it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the said John I. Blair, thereby commanding him, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court,

and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator will ever pray.

GEO. D. REYNOLDS,
Solicitor for Complainant.

JAMES CARR, *Of Counsel.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss* :

Josiah Fogg makes oath and says that he has read the foregoing bill, and states that the facts therein stated are true of his own knowledge, except as to the matters that are therein stated to be on information and belief, and as to those matters he believes them to be true as stated.

JOSIAH FOGG.

Subscribed and sworn to before me this 1st day of November, 1886.

[SEAL.] A. P. SELBY,
Clerk U. S. Circuit Court, Eastern District of Mo.,
By T. L. CRAWFORD, *Deputy.*

24 And afterwards, to wit, on the 2nd day of December, 1886, the following demurrer was filed in said cause and appears of record in words and figures following, to wit:

Demurrer to Bill.

In the Circuit Court of the United States for the Eastern District of Missouri.

JOSIAH FOGG, Plaintiff, }
vs. } In Equity.
JOHN I. BLAIR, Defendant. }

Demurrer of John I. Blair, defendant, to the bill of complaint of Josiah Fogg, the above-named complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill and for cause of demurrer shows—

That the plaintiff has not in and by his bill made such a case as entitles him in a court of equity to any relief from or against this defendant as to the matters contained in the bill or any of such matters.

That the said bill doth not contain any matter of equity whereon this court can ground any decree or give the plaintiff any relief against this defendant.

That it appears by the plaintiff's bill that there is no privity
25 between the plaintiff and the defendant to enable the plaintiff to call upon the defendant for payment of any debt due to the said plaintiff or any of the other unsatisfied judgment creditors mentioned in the said bill of complaint from the St. Louis, Hannibal and Keokuk Railroad Company.

Wherefore and for divers other good causes of demurrer appearing in the said bill the defendant doth demur thereto and humbly demand the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his cost and charges in the behalf most wrongfully sustained.

WALTER C. LARNED AND THEO. G. CASE,
Solicitors and of Counsel for Defendant.

I hereby certify that I am one of the solicitors and of counsel for the defendant in the foregoing cause, and that, in my opinion, the foregoing demurrer is well founded in point of law.

THEO. G. CASE,
Solicitor and of Counsel for Defendant.

UNITED STATES OF AMERICA, }
State of Missouri, County of Jackson, } *ss:*

John I. Blair.

John I. Blair, being duly sworn, deposes and says that he
26 is the defendant named in the bill of complaint filed in this cause and in the foregoing demurrer; that he has read the said demurrer and knows the contents thereof, and that the said demurrer is not interposed for delay.

JOHN I. BLAIR.

Subscribed and sworn to before me this 29th day of November, 1886; and my commission will expire Feb. 1st, 1887.

WM. T. JOHNSON,
Notary Public, Jackson County, Missouri.

27 And afterwards, to wit, on the 7th day of February, 1887, the following further proceedings were had and appear of record in said cause, to wit:

Demurrer Sustained.

JOSIAH FOGG, Complainant, }
vs.
JOHN I. BLAIR, Defendant. }

The demurrer of defendant to the bill of complaint herein having been heretofore submitted and the court now being fully advised thereof, it is ordered that demurrer be, and the same is, sustained.

And afterwards, to wit, on the 9th day of March, 1887, the following further proceedings were had and appear of record in said cause, to wit:

Bill Dismissed.

JOSIAH FOGG, Complainant,
vs.
JOHN I. BLAIR, Defendant.

Complainant declining to further plead, it is ordered that the bill of complaint herein be, and the same is hereby, dismissed with costs to the defendant, to be taxed.

Appeal Allowed.

And thereupon complainant prays an appeal to the Supreme Court of the United States, which is granted.

Complainant also files his appeal bond in the sum of $500.00, which bond is approved by the court and made a part of the record in this cause.

Said bond is as follows, to wit:

28 Know all men by these presents that we, Alexander J. P. Garesche, as principal, and Edmond A. B. Garesche, as surety, are held and firmly bound unto John I. Blair in the full and just sum of five hundred dollars, to be paid to the said John I. Blair, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at the September term, 1886, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Josiah Fogg, plaintiff, and John I. Blair, defendant, a decree was rendered against the said Josiah Fogg, and the said Josiah Fogg having obtained an appeal of the said court to reverse the decree in the aforesaid suit to the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Josiah Fogg shall prosecute said appeal to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

ALEX. J. P. GARESCHE. [SEAL.]
EDMOND A. B. GARESCHE. [SEAL.]
—— ——. [SEAL.]

Approved by—
AMOS M. THAYER, *Judge.*

[Endorsed:] No. 2593. United States circuit court, eastern division of the eastern judicial district of Missouri. Josiah Fogg *vs.*

John I. Blair. Bond, $500.00. A. J. P. Garesche, principal; Edmond A. B. Garesche, sureties. Filed 9th day of March, 1887. A. P. Selby, clerk.

29 UNITED STATES OF AMERICA, } ss:
Eastern Division of the Eastern Judicial District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2593, of Josiah Fogg, plaintiff, against John I. Blair, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this fifth day of May, in the year of our Lord eighteen hundred and eighty-seven.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District, Missouri. }

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2593. United States circuit court, eastern division of the eastern judicial district of Missouri. Josiah Fogg against John I. Blair. Duly certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 135. Josiah Fogg, appellant, *vs.* John I. Blair. Filed October 3, 1887.

FILED.
JAN 2 1891
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

JOSIAH FOGG,
Appellant.
vs.
JOHN I. BLAIR,

No. 135.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT AND BRIEF FOR APPELLANT.

JAMES CARR,
Solicitor for Appellant.

John I. Blair. Bond, $500.00. A. J. P. Garesché, principal; Edmond A. B. Garesché, sureties. Filed 9th day of March, 1887. A. P. Selby, clerk.

29

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss.

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2593, of Josiah Fogg, plaintiff, against John I. Blair, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this fifth day of May, in the year of our Lord eighteen hundred and eighty-seven.

(Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District, Missouri.)

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2593. United States circuit court, eastern division of the eastern judicial district of Missouri. Josiah Fogg against John I. Blair. Duly certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 135. Josiah Fogg, appellant, *vs.* John I. Blair. Filed October 3, 1887.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

JOSIAH FOGG,
Appellant.
vs.
JOHN I. BLAIR,
No. 135.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT OF THE CASE.

This suit was commenced on the 8th day of December, 1885, in the circuit court of the city of St. Louis, and on the 14th day of January, 1886, it was removed on the petition of the appellee on the ground of diverse citizenship. By leave of the Circuit Court of the United States the case was transferred from the law docket, and leave granted to appellant to reform his pleadings, and on the first day of November, 1886, he filed a bill in equity on behalf of himself and all other judgment creditors of the St. Louis, Hannibal & Keokuk Railroad Company who

should come in and seek relief by and contribute to the expense of this suit against the appellee. The material facts alleged in the bill are the following:

The St. Louis and Keokuk Railroad Company was authorized, by a special act of the General Assembly of the State of Missouri, entitled "An act to incorporate the St. Louis and Keokuk Railroad Company," approved February the 16th, 1857, to locate and build a railroad from some suitable point on the North Missouri railroad, not exceeding 30 miles west of St. Charles, in St. Charles county, Missouri, by way of Louisiana in Pike county, Hannibal in Marion county, La Grange and Canton, in Lewis county, Missouri, to some point near the mouth of the Des Moines river, on the northern boundary of the State of Missouri. That between the 1st of January, 1867, and the 1st of May, 1870, said St. Louis and Keokuk Railroad Company located the St. Louis and Keokuk railroad between what is now called Gilmore, on the Wabash, St. Louis and Pacific railroad, but at the time of making said location it was on the North Missouri railroad, about about 19 miles west of St. Charles, in St. Charles county, and Alexandria, Missouri, at the mouth of the Des Moines river, on the northern boundary of said State.

That said St. Louis and Keokuk Railroad Company completed said railroad from the Fair Grounds, near Hannibal, to Frankfort, in Pike county, a distance of 18 miles, and it graded 30 miles, or thereabouts, of said railroad in Lincoln Co. and the sum of $300,000 was expended, in doing said grading in said county, before the making of the contract between the appellee, John I. Blair, and Moses Taylor and the St. Louis, Hannibal and Keokuk Railroad Company, as hereinafter stated. That in grading said railroad in Lincoln county, and completing it between the Fair Grounds, near Hannibal and Frankfort, in Pike county, said St Louis and Keokuk Railroad Company

became indebted to a considerable number of persons and for a large sum of money. Among the persons to whom it became indebted was appellant, in the sum $9,547.75, for labor done and money furnished in the location and construction of said railroad.

On the 3d day of June, 1872, a new railroad corporation was organized under the General Statutes of the State of Missouri, called the St. Louis, Hannibal and Keokuk Railroad Company, with a capital stock of $6,000,000, divided into 60,000 shares of $100 each, for the purpose of building a railroad between the points named in the charter of the St. Louis and Keokuk Railroad Company, and over the same ground, most of the way, upon which said St. Louis and Keokuk Railroad Company had located, graded and completed a portion of its railroad as aforesaid.

On the 3d of March, 1873, said St. Louis and Keokuk Company assigned and transferred to said St. Louis, Hannibal and Keokuk Railroad Company its entire line of railroad, completed as well as unfinished, without paying said indebtedness to appellant or said other debts, and by said assignment and transfer it rendered itself incapable of paying said debt to appellant and also its other debts; but in the assignment said St. Louis, Hannibal and Keokuk Railroad Company was required to assume and pay, and it did assume and agree to pay, appellant's said debt, as well as said other debts. There was no consideration for said assignment and transfer, except the assumption and payment of appellant's and said other debts by said St. Louis, Hannibal and Keokuk Railroad Company, and it never paid appellant's said debt.

On the 21st day of September, 1880, appellant commenced suit against said St. Louis & Keokuk Railroad Company in the court below, which resulted in appellant's recovering judgment on said debt against said St. Louis

& Keokuk Railroad Company for the sum of $16,496.06 and costs, and on the 17th day of January, 1883, an execution was issued on said judgment and returned at the March term, 1883, *nulla bona*.

On the 3d of May, 1883, appellant filed a bill in equity in said court against both said companies to have said judgment declared a first lien on the property assigned and transferred as aforesaid; said court refused to declare said judgment a first lien on said property, but, it, on the 5th day of May, 1884, passed a final decree in favor of appellant against both said companies for the amount of said judgment, interest and costs, amounting to the sum of $18,355.11.

On the 24th day of February, 1881, the appellee, John I. Blair, and Moses Taylor, entered into a contract with the St. Louis, Hannibal & Keokuk Railroad Company by which they agreed to grade or cause to be graded the ungraded portion of the St. Louis, Hannibal & Keokuk Railroad, and to surface up the graded part thereof ready for laying the cross-ties and rails thereon between the south line of Pike county, near Prarieville in said county, in the State of Missouri, and Gilmore on the Wabash, St. Louis & Pacific Railroad to build the bridges thereon and to furnish all the materials and to complete said portion of said railroad on or before the 31st day of December, 1881, so that it, when completed, should be equal in construction and materials with the portion of said railroad then completed; in consideration for which said St. Louis, Hanbal and Keokuk Railroad Company agreed to pay and deliver to said Blair and Taylor the first mortgage bonds of said railroad company as would be equal to $12,000 a mile for each and every mile of said railroad so constructed by them, and $850,000 par value of the capital stock of said railroad company in full payment for the construction of said part of said railroad.

That immediately thereafter said Blair and Taylor commenced grading the ungraded portion of said railroad and *surfacing up* and prepairing the graded part thereof ready for laying the cross-ties and rails thereon, and went on and completed said part of said railroad on or about the 15th day of July, 1882, the portion thus completed being 38 miles of main track and 2 miles of side track; and said railroad company paid and delivered to said Blair and Taylor therefor the first mortgage bonds of said railroad company to the amount of $480,000, being $12,000 a mile for said main and side tracks, and on the 7th day of March, 1881, it issued and delivered to said Blair certificate No. 52½ for 4,250 shares of full paid stock in the capital stock of said company, the par value of which was $100, per share, and also on the same day, to Moses Taylor certificate No. 52¾ for 4,250 shares of full paid stock in the capital stock of said company, the par value of which runs $100 per share.

It is then averred that the work done by said Blair and Taylor on said part of said railroad as aforesaid was not worth more than $12,000 a mile , and that the payment and delivery of said $12,000 a mile in first mortgage bonds of said St. Louis, Hannibal and Keokuk Railroad Company to said Blair and Taylor was a full and adequate consideration for all the work done on said part of said railroad by said Blair and Taylor under said contract, and the issuing and delivery of said certificates for said 4,250 full paid shares each in the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company to said Blair and Taylor as aforesaid was without any valuable consideration paid or moving from said Blair and Taylor, or either of them, to said railroad company, and there was no consideration for said stock; and the agreement on the part of said St. Louis, Hannibal and Keokuk Railroad Company to issue and deliver to said Blair and Taylor

shares in its capital stock to the amount of $850,000, pretendingly in part payment for the completion of said part of said railroad between the south line of Pike county, Missouri, near Prarieville, in said county, and Gilmore, on the Wabash, St. Louis and Pacific railroad as aforesaid. *was only colorable and was a scheme* on the part of said Blair and Taylor to get said stock without paying therefor, and it was a *fraud* upon appellant and other creditors of said St. Louis, Hannibal and Keokuk Railroad Company; and that the making of said contract and issue and delivery by the directors and officers of the St. Louis, Hannibal and Keokuk Railroad Company of said certificates for said 4,250 shares each of full paid stock in the capital stock of said company to said Blair and Taylor without receiving the par value thereof either in money or work was a *breach of trust* of which said Blair and Taylor had full knowledge and notice, and that said stock in the hand of said Blair and Taylor was and is null and void as against appellant and other creditors of said St. Louis, Hannibal and Keokuk Railroad Company.

That by reason of the premises said John I Blair still owes and is indebted to said St. Louis, Hannibal and Keokuk Railroad Company the sum of $425,000, for said 4,250 shares in the capital stock of said railroad company issued and delivered to him as aforesaid; and the estate of Moses Taylor (he having died since the issue and delivery of said stock) likewise still owes and is indebted to said St. Louis, Hannibal and Keokuk railroad Company the sum of $425,000 for said 4,250 shares in said capital stock of said railroad company, issued and delivered to said Moses Taylor as aforesaid.

That on the 6th day of February, 1884, De Witt C. Blair, as trustee for said first mortgage bondholders, filed a bill in the court below against said St. Louis, Hanniba and Keokuk Railroad Company to foreclose the mort-

gage or trust deed on the railroad of said company securing said first mortgage bonds, which resulted in a final decree of foreclosure being passed on the 20th day of October, 1883, in pursuance of which said railroad and all other property belonging to said railroad company was sold to the appellee, John I. Blair, for the sum of $370,000; that said sum was not sufficient to pay said first mortgage bonds; that appellant's decree for $18,365 11 and costs was held to be junior and inferior to the lien of said mortgage or trust deed, and said railroad company had no property of any kind out of which appellant could make his said decree, unless the same may be made out of the shares of stock held by appellee and Moses Taylor's estate. That both the St. Louis and Keokuk Railroad Company and the St. Louis, Hannibal and Keokuk Railroad Company are insolvent.

That said St. Louis, Hannibal and Keokuk Railroad Company has no officers and keeps no office, and the foreclosure and sale of all its property as aforesaid, *dissolved* it as a corporation. That the capital stock of said St. Louis, Hannibal and Keokuk Company was and is a *trust fund* for the payment of its debts.

That Moses Taylor was a citizen of New York; that he first made his will and then died in 1882; that the executors of his will reside in the State of New York, out of the jurisdiction of the court below, and there are no other stockholders of said company whose stock is unpaid and who are known to appellant as such stockholders, save and except said John I. Blair, within the jurisdiction or who can be found within the jurisdiction of said county; nor were there any such when this suit was commenced.

The prayer of the bill is that John I. Blair be decreed to pay unto appellant the full amount of his said decree against said St. Louis, Hannibal and Keokuk Railroad Company, interest and costs; and also the full amount of

the judgments, interest and costs of said other unsatisfied judgment creditors of said railroad company as shall come in and contribute to the expenses of this suit in proportion to their respective demands; and that appellant and said other unsatisfied judgment creditors of said St. Louis, Hannibal and Keokuk Railroad Company may have such further relief in the premises as to the said court may seem meet and the circumstances of the case may require.

The appellee demurred to the bill, assigning the following grounds:

That the appellant has not made such a case as entitles him in a court of equity to any relief.

That the said bill doth not contain any matter of equity whereon this court can ground any decree or give the appellant any relief against appellee.

That it appears by the appellant's bill that there is no privity between the appellant and the appellee to enable appellant to call upon the appellee for payment of any debt due to the appellant, or any of the other unsatisfied judgment creditors mentioned in the said bill of complaint from the St. Louis, Hannibal & Keokuk Railroad Company.

The court below sustained the demurrer, and the appellant declining to further plead, the bill was, on the 9th day of March, 1887, dismissed with costs; and thereupon complainant prayed an appeal to the Supreme Court of the United States, which was granted.

ASSIGNMENT OF ERRORS.

On this record appellant assigns the following errors, viz:

First. The court below erred in sustaining appellant's demurrer to appellant's bill.

Second. Said court erred in dismissing said bill.

Third. Said court erred in not passing a decree that the appellee pay unto appellant the full amount of his said decree against the St. Louis, Hannibal and Keokuk Railroad Company, interest and costs; and also the full amount of the judgments interest and costs of such other unsatisfied judgment creditors of said railroad company as shal come in and shall contribute to the expenses of this suit.

BRIEF.

The questions presented by the record in this case are the following, viz:

First. Was the contract alleged in the bill a *scheme* on the part of Blair and Taylor to get 8,500 shares in the capital stock of the St. Louis, Hannibal and Keokuk Railroad Company without paying therefor?

Second. Did said scheme enable them to get said shares without paying the par value thereof in money or money's worth.

Third If it shall be held that it did, then is John I. Blair, (Moses Taylor being dead and his executors and estate out of the jurisdiction of the court below,) liable to the appellant and other unsatisfied judgment creditors of the St. Louis, Hannibal and Keokuk Railroad Company for the par value of said stock, or so much thereof as may be necessary to pay their judgments?

I. The law, in its wisdom, requires a railroad corporation have at least $10,000 for every mile of its road subscribed to its capital stock, and five per cent of its subscription paid in before it can get a certificate of incorporation.

Section 2,542 Rev. Stats. of Mo., 1889.

Creditors have a right to rely on the directors that they will manage this fund with honesty, sound judgment and business capacity.

Sturges v. Stetson, 1 Bissell, 246.
Fosdick v. Sturges 1 id. 255.
Flinn v. Bagley, 7 Fed. Rep. 785.
Sawyer v. Hoag, 17 Wall 610.
Wood v. Dummer, 3 Mason 308.

II. The capital stock of a corporation is a trust fund for the payment of its creditors.

Sawyer v. Hoag 17 Wall, 610.
Upton v. Tribilcock, Assignee, 91 U. S. 45.
Sawyer v. Upton, Assignee, 91 id. 56.
County of Morgan v. Allen, 103 id. 498.
Jackson v. Trae, 64 Iowa 469.

The directors of a corporation are trustees of its capital stock, with all the duties and obligations of trustees resting on them; and in the management of capital stock they are bound to exercise sound judgment, integrity and good faith in disposing of it.

Jackson v. Ludeling, 21 Wall 616.
Upton Assignee, v. Tribilcock, 91 U. S. 45.
Bouton v. Dement, 123 Ill. 142.

Capital stock, being a trust fund, may be followed by creditors in a court of equity, into the hands of every person who is not a *bona fide* purchaser thereof for value without notice, and hold such person as a trustee to the extent of the trust fund in his hands,

Sawyer v. Upton, Assignee, 91 U. S. 56.
Wood v. Dummer, 3 Mason 308, 312.
Curran v. Arkansas, 15 How, 304.
Taylor v. Bowker, 111 U. S. 289.

John I. Blair and Moses Taylor were the original takers of the stock in question. Hence the doctrine of *bona fide* purchaser for value without notice does not apply to the facts of this case.

Parties contracting with a corporation are bound to take notice of its capacity to constract.

Davis vs. Old Colony, R. R. Co. 131 Mass., 258.

Neither is a simulated payment of stock valid as against creditors.

Sawyer vs. Hoag, 17 Wall., 610.
Wetherbee vs. Baker, 35 N. J. Eq., 501.

The directors of a corporation have no power to release a subscriber to its capital stock to the prejudice of its creditors.

Burke vs. Smith, 16 Wall., 395.
Rider vs. Morrison, 54 Md., 29.
Bedford R. R. Co. vs. Bowser, 48 Pa. St. 37.

A party may become an original stockholder in the capital stock of a corporation by a contract under which a certificate for stock is issued and delivered by the corporation and accepted by the party, without even signing any subscription paper, as well as by signing a formal subscription paper.

Hawley vs. Upton, 102 U. S. 314.
Webster vs. Upton, Assignee 91 Id., 65.

The contract stated in the bill was not only a fraud on the other stockholders in the St. Louis, Hannibal & Keokuk Railroad Company, who had in good faith paid 100 cents on the dollar for their stock, but it was a fraud on

the creditors who gave credit to it on the faith that no stock would be issued without the corporation getting in return its par value in money or money's worth.

Sanger v. Upton, Assignee, 91 U. S. 56.

Said contract was also a breach of trust on the part of the directors of the St. Louis, Hannibal & Keokuk Railroad Company to which Blair and Taylor were parties and the fruit of which they shared.

Gilman, &c., R. R. Co. v, Kelly, 77 Ill. 426.

A payment of stock in depreciated currency is not binding on creditors.

The Macon & Augusta R. R. Co. v. Vason, 57 Ga. 314.

The owner of stock cannot escape liability by taking it in the name of his infant children.

Bowman v. Fry, 6 J. J. Marshall, 634.

Nor is it any defense to show that the holder took and held the stock as agent of the corporation, to sell for its benefit.

Allibone v. Hager, 46 Pa. St. 48.

A corporation cannot purchase its own stock and pay for it with its own property to the prejudice of its creditors.

Clapp *et al.* Exrs, v. Peterson, 104 Ill. 26.

Neither can it give away its stock.

Gilman, &c., R. R. Co. v. Kelly, 77 id. 426.

An agreement between a corporation and its stockholders that the stock shall be considered full paid and non-assessable upon the payment of a certain per cent of its par value is binding on the corporation and estops it from making any further calls on the stockholders. But if the corporation shall become *insolvent*, such agreement does not estop unsatisfied judgment creditors of the cor-

poration from subjecting the unpaid balance on the stock to the payment of their judgments.

Upton, Assignee v. Tribelcock, 91 Id., 45.
Sawyer vs. Upton, Assignee, 91 Id , 56.
Hawley vs. Upton, 102 Id., 314.
Scovill vs. Thayer, 105 Id., 143.

A sale of a railroad far below its value under a foreclosure decree obtained by virtue of a collusive agreement between the directors of the company, seeking to escape liability as indorsers therefor, and the purchasers, is not binding on the creditors and such sale will be set aside and held for naught and the purchasers held as trustees for the creditors of the company for the full value of the property, less the sum which the purchasers actually paid for a large lien claim and not for the nominal amount, they having bought it at a large discount.

Drury vs. Cross, 7 Wall, 299.
Jackson vs. Ludeling, 21 Id., 616.

IV.

It may be conceded for the purposes of this case, that the stock in question could be paid for in *work*; but when the rights of creditors intervene the payment can only be made in work at a reasonable price. The stockholder is not legally entitled to a credit of $1,000 on his stock when he only does $500 worth of work. And as contracts to pay for stock in work are frequently made to get the stock for nothing, or at least without paying par value therefor, and thereby cover up a fraud on *bona fide* stockholders and creditors of the corporation, they should be scrutinized by the courts with great care.

Jackson v. Trae, 64 Iowa 469.
Chouteau v. Dean, 7 Mo. Ap. 210.
Kehlor v. Lademan, 10 id. 550.
Moss v. King, 42 Iowa 478.
Boynton v. Hatch, 47 N. Y. 225.

The effect on the *bona fide* stockholders and creditors of an insolvent corporation is just as bad where its stock is vasted and frittered away by issuing it for work at an *excessive* or *overvaluation*, as where it has been issued an full paid when only a certain per cent. of its par value has been paid. The fraud is just as great in the former case as in the latter.

Now let us analyze the bill in this case and see whether the facts therein alleged do not bring it within the principles enunciated in the cases cited *ante*.

It is alleged in the bill that the work done by Blair and Taylor on the part of the railroad which they agreed to complete, was not worth more than $12,000 a mile, and that the payment and delivery of $12,000 a mile in the first mortgage bonds of the St. Louis, Hannibal and Keokuk Railroad Company to said Blair and Taylor was a full and adequate consideration for all the work done on said part of said railroad by said Blair and Taylor under said contract, and the issuing and delivery of certificates for 4,250 full-paid shares each in the capital stock of the St. Louis, Hannibal any Keokuk Railroad Company to said Blair and Taylor was without any valuable consideration paid or moving from said Blair and Taylor, or either of them, to said railroad company, and there was no consideration for said stock; and the agreement on the part of said railroad company to issue and deliver to said Blair and Taylor shares in its capital stock to the amount of $850,000, pretendingly in part payment for the completion of said railroad, was only *colorable*, and was a *scheme* on the part of said Blair and Taylor to get said stock without paying therefor, and it was a *fraud* upon appellant and other creditors of said railroad company; and the issue and delivery by the directors and officers of said railroad company of certificates for said 4,250 shares each of full-paid stock in the capital stock of said railroad com-

pany to said Blair and Taylor, without receiving the par value thereof either in money or work, was a *breach of trust* of which said Blair and Taylor had full knowledge and notice.

It is alleged that the agreement on the part of the St. Louis, Hannibal & Keokuk Railroad Company to deliver to Blair and Taylor shares in its capital stock to the amount of $850,000, pretending in part payment for the completion of said part of said railroad between the south line of Pike county, Missouri, near Prarieville, in said county, and Gilmore on the Wabash, St. Louis & Pacific Railroad, was only *colorable*. What does colorable mean as used in this allegation? Webster defines it as follows: "From color, q. v. Designed to cover or conceal; specious; plausible; giving an appearance of right and justice."

That is precisely what was intended by this agreement. It was designed to cover and conceal the fact from the stockholders, who had in good faith paid 100 cents on the dollar for the stock issued to them, and also to make it appear on the books of the railroad company to creditors, that Blair and Taylor were paying "money's worth" for the large amount of stock issued to them, whereas in fact they were not paying anything at all, either in money or money's worth, for the stock.

Webster gives the following among other definition of word "color", viz: "That which covers or hides the real character of anything; semblance; show; pretense; disguise; appearance."

Does this contract cover or hide the real character of the transaction? It certainly does. It gives an appearance of right and justice on its face. It is only upon an investigation of the actual cost of completing the part of the railroad in question that we find out the gigantic fraud that is perpetrated upon stockholders and creditors.

Moreover, it is alleged that this contract was a *scheme*

on the part of Blair and Taylor to get said stock without paying therefor, and it was a *fraud* on appellant and other creditors of the St. Louis, Hannibal and Keokuk Railroad Company. What does the word *scheme* mean as used in this allegation? Webster gives the fowlling, among other definitions, viz: "plan; project: design; contrivance; purpose; device.

This contract was a shrewd device for accomplishing the desired end, *i. e.* to get $850.000 worth of the capital stock of the St. Louis, Hannibal and Keokuk Railroad Company without paying anything for it. Suppose Blair and Taylor had paid into the treasury of the railroad company the par value of the stock issued to them, $850,000, instead of pretendingly paying for it in work, would any board of directors have made a contract with them, or any other contractor, to pay $31,250 a mile for *surfacing* up 30 miles of graded track, grading 8 miles of track, and then putting in the cross-ties and laying iron rails on these 38 miles of main track and 2 miles of side track? If they did, only one deduction could be drawn from such an excessive price paid for the work done and materials furnished *i. e.* that there was collusion between the directors of the company in whose name the contract was made and the contractor.

The contract was to grade that part of the St. Louis, Hannibal and Keokuk Railroad, which remained ungraded between the south line of Pike county, near Prarieville in said county, in the State of Missouri, and Gilmore on the Wabash, St. Louis and Pacific railroad to build the bridges and furnish the cross-ties and rails so as to have it completed on or before the 31st day of December, 1881.

The St. Louis and Keokuk Railroad Company (the Old Company) had completed its railroad from the Fair Ground near Hannibal to Frankfort in Pike county, a dis-

tance of 18 miles and it had graded 30 miles of its road in Lincoln county which had cost $300,000, prior to its transferring its railroad to the St. Louis, Hannibal and Keoknk Railroad Company (the New Company) on the 3rd day of March, 1873. All that was necessary to be done on these 30 miles was to *surface* up the road bed and put down the cross-ties and lay the iron rails. Side tracks are only laid at depots and stations; and depots and stations are always located on level ground, so that there is no grading necessary for side-tracks. All that is necessary to be done to prepare a side-track ready for use is to lay cross-ties on the ground and spike the iron rails thereto, There were only 8 miles to be graded.

In consequence of the great improvements, since the war, in appliances in railroad building; for instance the use of steam-shovels in grading and the use of improved machinery in blasting; the cost of building a railroad has been reduced to one-fourth about of what it cost to build a railroad before the war.

How much would it cost to *surface* up the 30 miles of graded road? say $1,000 a mile—$30,000; and $5,000 a mile for iron rails—$150,000. Grading would cost not exceeding $10,000 a mile. That is what the grading the 30 miles in Lincoln county cost prior to 1873, when greenbacks were at considerable discount; $1,000 a mile for cross-ties and $5,000 a mile for iron rails. Two miles of side track would cost $1,000 a mile for cross-ties and $5,000 a mile for iron rails. The cost then of completing the 40 miles —38 miles of main track and two miles of side track would be as follows:

Surfacing up 30 miles of graded track at $1,000 a mile	$30,000
Grading 8 miles at $10,000 a mile	80,000
40 miles of cross-ties at $1,000 a mile	40,000
40 miles iron rails at $5,000 a mile	200,000
Total cost	$350,000

For which Blair and Taylor were to get $12,000 per mile in first mortgage bonds, equivalent to $12,000 a mile in cash, or in other words, $480,000. Deducting the cost of building from this sum leaves the sum of $130,000 for profit on the contract. This is a very handsome profit on a contract of no greater magnitude than this contract.

Blair and Taylor's contract embraced about half the road. The whole road—81 miles—was sold under a decree of foreclosure of the first mortgage to John I. Blair, the appellee, on the 8th day of December, 1885, for the sum of $370,000, being the sum of $4,567 a mile, and this embraced the rolling stock, depot grounds and all the appurtenances to the road as well as the road and right of way.

The foregoing calculation is on the assumption that it cost $16,000 a mile to grade, tie and iron the road. It would cost $8,000 more a mile to buy the right of way, depot grounds and build depots and station houses and the usual appurtenances to a railroad and rolling stock to operate it. This would be the cost of a road not expected to do much business. On this basis this road was worth the sum of $1,944,000, when the appellee bought it at the foreclosure sale for $370,000. That would leave a net gain to him of $1,574,000 on his investment.

This case is a good illustration of what a profitable business it is, when a man has the capital to *wreck* a railroad! If it be said that the foregoing calculation is based on too low an estimate of the cost of building and equipping a railroad, then, I answer that when the appellee bought the road in question for the sum of $4,567 a mile, or for the aggregate sum of $370,000, the goodness of his purchase is correspondingly enhanced and his profit may be much more than the sum stated. In other words, instead of being only $1,574,000, it may be nearly or quite $2,-

000,000, and he can well afford to pay for his $425,000 of stock issued to him under the contract for nothing and still be very greatly ahead on his purchase. It may be added, as there is nothing in the record to show the amount of unsatisfied judgments against the St. Louis, Hannibal and Keokuk Railroad Company, except the appellant's, that that they will not exceed $15,000.

In any aspect of the case, by the wrecking of the St. Louis, Hannibal and Keokuk Railroad Company, John I. Blair has acquired a property worth at least $2,000,000, for the sum of $370,000, plus whatever sum he may have to pay on his 4,250 unpaid shares of the capital stock of said company to the unsatisfied judgment creditors thereof.

If capital stock acquired under the circumstances stated in the foregoing cases cannot be held to be full paid as against the creditors of an insolvent corporation; and if the property of an insolvent corporation acquired at a foreclosure sale far below its value by virtue of a collusive agreement between the directors and officers of the corporation and the purchasers of its property, then John I. Blair the appellee should not be allowed to escape paying on his stock the appellant and other unsatisfied judgment creditors the amount of their judgments.

JAMES CARR,
Solicitor for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

JOSIAH FOGG

vs.

JOHN I. BLAIR.

Appeal from the Circuit Court of the United States, for the Eastern District of Missouri.

No. 135.

Brief for Appellee.

WALTER C. LARNED,
Solicitor for Appellee and of Counsel.

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No. 135. October Term, 1890.

JOSIAH FOGG
vs.
JOHN I. BLAIR.

Appeal from the Circuit Court of the United States, for the Eastern District of Missouri.

BRIEF FOR APPELLEE.

Statement of Facts.

It appears in the transcript of record in this case at page 6 from the amended bill of complaint, as filed in the court below, that one Josiah Fogg, of St. Louis, claims to be a judgment creditor of the St. Louis, Hannibal and Keokuk Railroad Company. His judgment was obtained under the following circumstances: A railroad, known as the St. Louis and Keokuk Railroad, was incorporated under the laws of Missouri in the year 1857, and authorized to construct a railroad in Missouri between certain points as stated in the said bill of complaint at page 7. The said St. Louis and Keokuk Railroad Company completed its railroad from a point called the Fair Grounds, in Hannibal to Frankfort, in Pike County, a distance of eighteen miles, beside having done considerable grading upon other parts of its proposed line. The complainant here claims that about thirty miles of grading was done, and about $300,000 expended in said grading before the making of a contract between John I. Blair

and others and the St. Louis and Keokuk Railroad Company, which will be hereafter more specifically set forth. The grading was not all paid for, and Fogg claims that he did a part of it and has never been paid therefor. His final settlement with the St. Louis and Keokuk Railroad Company, with which company his contract had been made, was had on the 22d of September, 1870, and it was found that at that time the sum of $9,547.75 was due him.

In 1872 the St. Louis, Hannibal and Keokuk Railroad Company was organized (see transcript of record, page 7). This road was organized for the purpose of building a railroad in the same general direction as the St. Louis and Keokuk Railroad, but not upon a route absolutely coincident with that chosen by the former road.

In 1873 the St. Louis and Keokuk Railroad Company made a transfer of all its property by deed to the St. Louis, Hannibal and Keokuk Railroad Company, the last named company, at the same time agreeing to pay the indebtedness of the first road. The St. Louis, Hannibal and Keokuk road then entered into possession of all the property of the St. Louis and Keokuk Railroad Company, and remained in possession of it down to the time of the foreclosure of a mortgage upon it in the United States Court at St. Louis.

The St. Louis, Hannibal and Keokuk Railroad Company did not pay the claim of Mr. Fogg. At page 8 of the transcript is shown the proceeding of Fogg against the St. L. & K. R. R., and afterwards against the St. L. H. & K. R. R., resulting in a judgment against the St. L. & K. R. R. Co. in favor of Fogg in 1882 for $16,496.06. Execution was taken out upon it, but no property of the St. L. & K. R. R. Co. was found upon which to levy it. In 1883 Fogg commenced proceedings against the St. L., Hannibal and Keokuk R. R. Co., and obtained judgment in 1884 against that railroad for $18,365.11. On page 9 of the transcript it is stated that in 1881, three years before the date of the judgment obtained by Fogg against the St. L. H. & K. R. R. Co., John I. Blair, appellee

in this case, together with Moses Taylor of New York City, made a contract with the St. L. H. & K. R. R. Co., by which contract Blair and Taylor agreed to grade and bridge the unfinished portion of the road and to furnish ties and rails therefor, and to complete the construction of the road as indicated in said contract by the last part of the year 1881. The consideration, which Blair and Taylor were to receive for this construction of said railroad, is stated upon page 10, as follows: Blair and Taylor were to be paid $12,000 per mile in first mortgage bonds of the said railroad company, and they were also to be paid $850,000 in par value of the capital stock of said railroad company.

It is stated on the same page that the work was completed by Blair and Taylor in accordance with the contract; that the bonds were issued to them to the amount of $480,000, being at the rate of $12,000 per mile of said road, and that a certificate was issued to John I. Blair for 4,250 shares of full paid stock in the capital stock of said railroad company and a similar amount was issued to Moses Taylor. This full paid stock which is said to have been a part of the consideration of the contract was issued and delivered to Blair and Taylor in the year 1881, which was three years before the obtaining of judgment by Fogg against the St. L. H. & K. R. R. Co. upon his claim.

The complaint then goes on to allege that the payment of bonds at the rate of $12,000 a mile was enough to cover the expense of building the road, and that consequently there was no consideration for the capital stock that was issued to Blair and Taylor in addition to the bonds as above stated. He therefore claims that said stock was not paid for, and that the stock in the hands of Blair and Taylor was and is null and void as against him and other creditors of said railroad company. (Transcript, p. 11.) Complainant then goes on in his bill to state the proceedings of foreclosure against the St. L. H. & K. R. R. Co.; that it was sold under a decree of the United States Circuit Court at St. Louis, and that the proceeds of the sale were not sufficient to pay the bonds and his judgment. The complaint also al-

leges the insolvency of both railroads, the St. L. & K. and the St. L., H. & K. Upon page 12 of the transcript is stated the death of Moses Taylor and the fact of his executor being in New York City, out of the jurisdiction of the court, and that no other stockholder holding unpaid stock could be found, beside Mr. Blair, within the jurisdiction of this court at the time this suit was commenced. The prayer of the complaint is that the certificate for 4,250 shares of full paid stock of the capital stock of said St. L., H. & K. R. R. Co., delivered to John I. Blair, be cancelled, and that Blair be decreed to pay to complainant the full amount of his judgment against said railroad, with interest and costs, and also the full amount of the judgments with interest and costs of any other judgment creditors of said road who shall come in and contribute to the expenses of the suit.

ARGUMENT.

It appears, from this statement of facts, that the stock, which is alleged to have been issued to the defendant, John I. Blair, was issued to him as full paid stock. There is no statement or allegation anywhere in the bill contained, that Mr. Blair was ever a subscriber to the stock of said railroad, excepting in the way set forth in the bill, namely that he received 4,250 shares of stock full paid as a part of the consideration for building the railroad.

The statute, regulating the liability of stockholders in a corporation in force at the time this certificate of stock was issued to Mr. Blair, is found in Vol. 1, Rev. Stat. of Missouri, of 1879, at page 121, Sec. 736. The statute is to the effect that execution may issue upon order of court in favor of a judgment creditor who has exhausted his remedy against the corporation, to the extent of the unpaid balance due upon such stock, and no stockholder is to be liable for any amount greater than the amount of stock owned by him. It appears then plainly upon the face of the bill itself that there was no liability upon Mr. Blair as a stockholder in this road to any of said judgment creditors, because his stock was fully paid.

A demurrer was interposed to the bill in the court below and was sustained. It will be urged by the appellant that this demurrer admitted certain statements contained in the bill to be facts, which statements were to the effect that there was really no consideration for said stock, because the road did not cost more than the amount of bonds which Blair and Taylor received for building it.

It is necessary in this connection to determine exactly what facts a demurrer does admit. It is a well known principle of law that a demurrer does not admit as facts legal conclusions, deductions or inferences. It admits only such facts as are well pleaded. In this case the demurrer admits that this stock was issued to Mr. Blair as full paid stock, because that is plainly stated in the bill. It is also plainly stated that there was a consideration for the issuing of the stock, which seemed adequate to the railroad company, or they never would have issued it. The consideration is very plainly stated, and there can be no doubt at all as to the validity of the transfer of the stock at the time that the transfer was made. The complainant then goes on to reason or argue that there was no consideration for the stock because of certain things that happened afterward. It is a very familiar principle that no demurrer admits to be facts any such deductions or conclusions as are here sought to be deduced.

In the case of *Dillon* v. *Barnard*, in 21 Wallace, page 430, this court held: "A demurrer only admits facts well "pleaded. It does not admit matters of inference or argu- "ment, however clearly stated. It does not admit, for ex- "ample, the accuracy of an alleged construction of an "instrument, when the instrument itself is set forth in the "bill, or a copy is annexed, against a construction required "by its terms; nor the correctness of the ascription of a "purpose to the parties when not justified by the language "used."

The law relating to the subject of admissions made by demurrers is very clearly set forth in the case of Grenville Murray v. Earl of Clarendon, 9 Law. Rep. Eq. Cases, page

17, and this ruling has been followed in all the cases in the United States Courts touching this point. An extract of the opinion reads as follows: "In the first place it is proper to "observe that in all these cases a general allegation will not "do for the purpose of supporting a bill against demurrer. "It is quite true that the defendant when he demurs to a "bill admits all the statements in the bill to be correct, for "the purpose of demurrer, and says, admitting all those to "be true on your own showing, you have not made out a "case for relief. But that is to be treated with this qualifica- "tion, that it will not do to allege a thing which does not "appear to be the fact, upon the circumstances stated in the "bill, in order to entitle you to relief."

See, also, *United States* v. *Ames*, 99 U. S. 35.
Ford v. *Peering*, 1 Ves. Ch. 71.
Lea v. *Robeson*, 12 Gray, 280.
Redmond v. *Dickerson*, 1 Stockton, 507.
Beckham v. *Drake*, 9 Meeson & Welsby, 78.
Sprigg v. *Bank of Mt. Pleasant*, 14 Peters, 201.
Nesbitt v. *Berridge*, 8 Law Times N. S. 76.

The difficulty of the complainant's position in seeking to maintain that this stock was not full paid and that consequently the holder of it is liable for the debts of the corporation, is further shown by the inconsistency between the prayer of the bill and the statements contained in it. The prayer is found on page 12 of the transcript and is as follows: "That the said certificate for said 4,250 shares of full "paid stock in the capital stock of said St. Louis, Hannibal "and Keokuk Railroad Company, issued and delivered to "said John I. Blair as aforesaid be cancelled, as having "been given by said railroad company, and received by "said John I. Blair without any consideration, and that said "John I. Blair be decreed to pay unto your orator the full "amount of his said decree against the said St. Louis, Han- "nibal and Keokuk Railroad Company, interest and costs, "and also the full amount of the judgments, interests and "costs of such other unsatisfied judgment creditors of said

"railroad company, as shall come in and contribute to the "expenses of this suit, in proportion to their respective de- "mands."

Why should the defendant be expected to pay the indebtedness of the road if he held no stock and his certificate was cancelled? This is not at all the relief contemplated by the statute of Missouri, which required that a stockholder in a corporation should be liable to its judgment creditors, to the extent of the amount of unpaid stock held by such stockholder. This stock having been issued without any consideration, according to the statements of complainant, is to be cancelled, and the whole transaction in such case would be made null and void. The truth is either Mr. Blair was a stockholder in this road to the extent of 4,250 shares of full paid stock, or he was not a stockholder at all. If the transaction was culpable or fraudulent in such a way as to invalidate it, certainly he never was a stockholder who had paid a part of the consideration for his stock and owed a balance upon it. That is the only kind of a stockholder contemplated by the statute governing his liability to judgment creditors. It would be perfectly impossible in this case to fix any amount due and unpaid upon the defendant's stock, for he never subscribed to it in any other way except as full paid stock. If this were a bill in equity, based upon fraud, the only proper prayer must have been that the transaction between the company and Mr. Blair be declared fraudulent and void, and that the shares of stock held by Mr. Blair be returned to the company as part of its assets to be sold for the benefit of its creditors. No other relief could be obtained by an equitable proceeding upon the facts of this case, and it is clear that the form prescribed under the statute has not been followed at all, for the statute distinctly says that no execution shall issue against the stockholder for liability to a judgment creditor to the amount unpaid of his stock, excepting after motion in court, where the judgment was obtained notice having first been served upon said stockholder and an order of court, that the execution against said stockholder

shall issue. It is not alleged in this bill that any such proceedings were ever taken in the court below, consequently the statute does not cover this case because the proceeding required by it was not taken.

It is alleged in the bill itself on page 11 of the transcript, as follows: "Your orator says that the making of said "contract and issue and delivery by the directors and offi- "cers of the St. Louis, Hannibal and Keokuk Railroad "Company of said certificates for said 4,250 shares, each of "full paid stock in the capital stock of said company, to "said Blair and Taylor, without receiving the par value thereof, either in work or money, was a breach of trust of "which said Blair and Taylor had full knowledge and "notice, and your orator says that the said stock in the "hands of said Blair and Taylor was, and is, null and void "as against your orator and other creditors of said St. "Louis, Hannibal and Keokuk Railroad Company." If the stock in the hands of Blair and Taylor is null and void, it is a little difficult to see how it can be made the basis of a suit to enforce stock liability. The only remedy which complainant could seek would be a return of the certificate to the company, so that it might become an asset for the benefit of the creditors.

There was no privity between the complainant and defendant. It has been stated that Fogg obtained his judgment against the St. Louis, Hannibal and Keokuk Railroad Company on the fifth day of May, 1884. The contract between Blair and Taylor and the railroad company was made on the twenty-fourth day of February, 1881. The stock, which was agreed to be delivered under this contract, is stated to have been delivered on the seventh day of March, 1881. (Page 10 of the transcript.) When, therefore, this contract was made and the stock delivered, the defendant, Blair, had no notice or knowledge of the existence of any claim of said Fogg against the said railroad company, nor was any such claim in fact in existence, the judgment not having been obtained until two years after the consummation of the transaction between Blair and Taylor and the railroad company. If

there was any breach of trust on the part of the directors of this railroad company in issuing this stock, wherewith the road was to be built, while there were outstanding claims against the company, unsatisfied, that should be a matter between Mr. Fogg and those directors. Defendant, not knowing of the existence of any such indebtedness (and in fact if he examined the records he would have found nothing concerning it) had a perfect right to take this stock, upon the consideration named, without creating any liability to Mr. Fogg whatever, whether legal or equitable, no relation of contract or trust being possible to be established between them under such conditions. I refer briefly to the case in Missouri construing the statute as to the stock liability. That stock may be paid for in work as well as in money is a well recognized principle of corporation law.

Liebke et al. v. *Knapp*, 79 Mo. 22.

There is no liability upon full paid stock.

Schricker et al. v. *Ridings*, 65 Mo. 208.

WALTER C. LARNED,
Solicitor for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

JOSIAH FOGG, *Appellant.*

vs.

JOHN I. BLAIR, *Respondent.*

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Now comes the appellant and petitions the Court to grant a rehearing in the above entitled cause, and for grounds for rehearing the appellant assigns the following, viz:

First. It is alleged in the bill that the St. Louis, Hannibal and Keokuk Railroad Company was organized under the general statutes of the State of Missouri, with a capital stock of $6,000,000, divided into 6,000 shares of $100 each. This was in conformity to the requirements of said statutes.

§§ 2,542, 2,544, Rev. Stats., 1889.

A share of stock was fixed by contract under the statute at $100 a share. The corporation cannot make the payment of any *less* sum a valid payment for stock as against the *creditors* of the corporation.

Sawyer vs. Hoag, 17 Wall. 610.

Tribilcock vs. Upton, 91 U. S. 45.

Shickle vs. Watts, 74 Mo., 410.
Gillew vs. Balis, 72 id., 424.

The opinion delivered in this case interpolates a condition into the contract of the appellee, which the law does not, *i. e.*, that the creditors of an insolvent corporation suing a stockholder for his unpaid stock, must allege in his bill "the *actual value* of the stock at the time it was contracted to be issued," as a necessary averment to show the liability on the part of such stockholder. This is not only in contravention of the contract which the stockholder entered into with the corporation when he accepted the certificate for the stock, but it is erroneous in principle and in direct conflict with every case heretofore decided by this Court on the subject, and it should not be allowed to stand as the law on this subject.

If the principle laid down in the opinion in this case should be held to stand, as the law on the subject, then it opens the door wide for *the practice of the worst kind of fraud*. A contractor may undertake to build one-third or one-half of a railroad for first mortgage bonds of the company, enough to pay him a fair and reasonable compensation, and then require the corporation, in addition, to give three-fifths or three-fourths of the capital stock for which he pays nothing, but with which he elects a board of directors to carry out his wishes. Having received full compensation for the building of the road, he then gets the company, through the directors elected by his stock, for which he paid nothing either in money or "money's worth," to *default* in paying the interest on his first mortgage bonds, forecloses his mortgage and buys in the road at foreclosure sale for a small sum of money, and thus he wipes out the corporation and all the interest of the stockholders therein. He cares nothing for the majority of stock issued to him. He paid nothing for it. He can well afford to let it go. He

makes money by buying in the road at a comparatively small sum of money. If the principle laid down in the opinion in this case is to be the law applicable to contracts of the kind in question, then railroad contractors can pile up collossal fortunes by *wrecking* railroad companies through the medium of decrees of foreclosure rendered by the Federal courts. This case is an illustration of how easy it will be to wreck a railroad company when the contractor holds the majority of the stock for which he pays nothing and upon which creditors of the corporation can not compel him to pay anything.

The appellee did not have his trustee, DeWitt C. Blair (who was his son), take any steps to foreclose his mortgage and thereby prevent the appellant from making the money on his decree until nine months after appellant had filed his bill. The bill to foreclose was filed February the 6th, 1884, and appellant got his decree againts the St. Louis, Hannibal and Keokuk Railroad Company May the 5th following.

If the principle of this case had been applied in the case of Sawyer vs. Hoag (17 Wall, 610), the stock being treated by Sawyer and the Insurance Company as full paid, although only 15 per cent. had in fact been paid, Sawyer never would have been compelled to pay the unpaid 85 cents an the dollar on his stock.

Second. It is respectfully submitted that the opinion is erroneous in holding that the bill only states a *legal conclusion* when it avers that "the agreement on the part of the St. Louis, Hannibal and Keokuk Railroad Company to issue and deliver to Blair and Taylor shares in its capital stock to the amount of $850,000. pretendingly in part payment for the completion of said part of said railroad between the south line of Pike county, Missouri, near Prairieville, in said county, and Gilmore, on the Wabash St. Louis and Pacific railroad as aforesaid was only color-

able and was a scheme on the part of Blair and Taylor to get said stock without paying anything therefor." The facts constituting the *scheme* are very clearly and fully set out in the bill on pages 9 and 10 of the transcript, and then follows the averment just quoted. It is averred that the *facts* stated, showing the "*scheme* on the part of said Blair and Taylor to get said stock without paying therefor," are all that the rules of pleading require to be stated. If the averment went any more into details it would be obnoxious to the objection of pleading *evidence*, which the rules of pleading prohibit.

Shickle vs. Watts, 94 Mo. 410.
Sawyers vs. Hoag, 17 Wall, 610.
County of Morgan vs. Allen, 103 U. S. 510.

It has not been the understanding of the profession since Mr. Justice Story decided the great leading case of Wood vs. Dummer (3 Mason, 308), that it is necessary to allege, that the stock upon which the creditor of an insolvent corporation seeks to hold the stockholder liable had any *actual* or *market* value at the time it was issued to him; that the stockholder is liable to a creditor for the difference between the *par* value of the stock as fixed by law, or contract in pursuance of law, and the sum actually paid by the stockholder.

The pleader did not deem it necessary to allege in the bill more than the *par* value of the stock in question as fixed by the articles of association, and when he alleged that the appellee paid nothing for the 4,250 shares of full paid stock issued to him, that *ipso facto*, it fixed a liability on him to the amount of the *par* value of his stock, or sufficient thereof to pay the appellant's decree; and if the creditors of insolvent corporations are to be held to the principle laid down in the opinion in this case, then it is averred that stockholders when they have got a certificate

for full paid stock will always escape liability for their unpaid stock, for the reason that a creditor would never be able, after the corporation has become insolvent, to prove that the stock issued long after the organization of the corporation had any value. The principle is erroneous. It is equivalent to letting such men as appellee go "scot-free" on their stock; and the capital stock provided for by the statute will be "a snare and delusion" to creditors dealing with a railroad corporation which should become insolvent

It is respectfully submitted that the appellant is entitled to a rehearing on the grounds stated.

JAMES CARR,
Solicitor for Appellant.

I, James Carr, hereby certify that I am counsel in the foregoing cause; that in my opinion the grounds stated in the foregoing petition are well founded in law and entitle the appellant to a rehearing of said cause.